IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JUNIOR SALAS JESUS,
Defendant-Appellant.

Supreme Court Case No.: CRA08-001
Superior Court Case No.: CF0381-07

OPINION

Cite as: 2009 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted on October 28, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ALEXANDER C. CASTRO, Justice *Pro Tempore*.

TORRES, C.J.:

[1] Defendant-Appellant Junior Salas Jesus appeals from a conviction on two charges of misdemeanor assault and one charge of misdemeanor family violence stemming from an auto-pedestrian collision involving his girlfriend, Julie Sandra Muna Gadia. Jesus argues that the trial court violated his Sixth Amendment Confrontation right on the theory that if a witness testifies on the stand but claims lack of memory and is thus defined as "unavailable" by Rule 804(a)(3) of the Guam Rules of Evidence ("GRE"), the witness/declarant is also "unavailable" for the purposes of the Confrontation Clause. Jesus further asserts that the trial court erred in admitting out-of-court statements made by witness-victim Gadia as an excited utterance exception under GRE 803(2) where such statements were made in response to police officers' questions nearly a week after being run over by a truck. Finally, Jesus believes that the trial court erred in denying a motion for a judgment of acquittal because the evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

[2] For the reasons set forth below, we affirm the judgment of the Superior Court.

I. Factual and Procedural Background

[3] On the night of August 3, 2007, Emergency Medical Technicians (EMTs) and police officers found Gadia in critical condition after being run over by a 1997 Mazda pickup truck belonging to Gadia's boyfriend, Jesus. Gadia experienced such a degree of physical trauma that she could not verbally respond to the EMTs and all she could do was move her eyes in response to light and groan in pain. She was transferred to the Naval Hospital where she underwent surgery.

[4] In furtherance of a criminal investigation, early the next morning Officer Jessica Meyenberg interviewed Jesus. During this interview, Jesus told Officer Meyenberg that "throughout their two years [Jesus and Gadia] had a lot of problems" "mainly because he would accuse her of having affairs" and that just prior to the auto-pedestrian collision, Jesus and Gadia were arguing about whether she was having an affair with one of her co-workers. Transcripts ("Tr.") at 14-18, 47, 53. (Jury Trial, Nov. 19, 2007).

[5] Gadia spent nearly a week recovering in the Intensive Care Unit of the Naval Hospital. On August 9, 2007, at around 11:55 a.m., Officer Donald Nakamura was informed that Gadia had awaken and said that Jesus ran her over twice. Lt. Krejci of the Naval Hospital told Officer Nakamura that Gadia would be more awake and responsive for an interview in a few hours after the sedatives wore off.

[6] At around 2:00 p.m. the same day, Officer Nakamura was informed that Gadia was more responsive. At 2:38 p.m., Officer Nakamura arrived at the Naval Hospital and met with Lt. Krejci who said that Gadia spoke softly because the ventilator tube was recently removed from her mouth.[1] Officer Nakamura then interviewed Gadia. After Gadia began coughing heavily and started to moan, Officer Nakamura ended the interview and informed Gadia that he would return at a later time to interview her again.

[7] The following day, on August 10, 2007, Officer Nakamura (along with Officer Meyenberg) returned to the hospital for a second interview with Gadia. In the hospital room, Gadia ended a telephone conversation with her family in order to speak to the officers and they proceeded with a second interview.

[1] Lt. Krejci was off-island during the trial and unavailable to testify as to Gadia condition and statements made on August 9, 2007. Tr. at 73-74 (Jury Trial, Nov. 20, 2007).

[8] Jesus was indicted for the following charges: 1) First Degree Felony Attempted Aggravated Murder; 2) Second Degree Felony Aggravated Assault with a special allegation of Use of a Deadly Weapon in the Commission of a Felony; 3) Third Degree Felony Aggravated Assault, with a special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; and 4) Third Degree Felony Family Violence. Appellant's Excerpts of Record ("ER") at 1-2 (June 4, 2008).

[9] At the trial, Gadia testified that she did not remember speaking to Officer Nakamura on August 9, 2007. Although Gadia testified that she remembered that two officers were asking her questions on August 10, 2007, she did not remember what was said. Gadia also testified that she had been unconscious for a period of time and had memory loss.

[10] The defense had the opportunity to elicit very favorable and detailed testimony from Gadia on cross-examination. The defense asked Gadia about her past marriage to demonstrate that Gadia has sought and would seek help from the police if a domestic dispute would occur. Gadia described in detail her conversation and interactions with Jesus just prior to the auto-pedestrian collision. Gadia explained why she believed the chassis was broken on the truck and described the inside of the truck in detail. In response to the defense's questions, Gadia testified that she and Jesus never argued in public and that the auto-pedestrian collision was her fault.

[11] To help explain why Gadia asserted that the auto-pedestrian collision was her fault, the prosecution called Dr. Mary Katherine Fegurgur, a qualified expert in the field of family violence. Dr. Fegurgur testified that victims of domestic abuse typically minimize the seriousness of the violent episodes, are more likely to blame themselves, have less social support separate from the alleged perpetrator, and are more likely to have a previous history of physical abuse. Dr. Fegurgur explained that over fifty-three percent of domestic abuse victims will

remain with the perpetrator despite interventions and hospitalization. Dr. Fegurgur discussed in depth the role of jealousy in domestic violence and how it stems from a perpetrator's need to control the victim. To further rebut Gadia's testimony during the trial, the prosecution impeached Gadia with her initialed and signed statement that she made to defense investigator Ricardo Taimanao.

[12] To prove the element of intent, the prosecution called Officers Viera and Sanchez who testified that the incline of the road where the collision occurred was not steep enough for a vehicle to roll down by itself. Officer Sanchez also testified that even if the truck had rolled down the gravel road with its 11.9 percent incline, an object in the road would have acted as a "chock or ramp that would [have] stop[ped] the pickup." Tr. at 22, 25 (Jury Trial, Nov. 20, 2007). Officer Sanchez concluded that in order for the truck to go over a human body or even a small object, the pickup needed to be accelerating, which meant someone had to be stepping on the gas.

[13] The trial court admitted into evidence excerpts from Officer Nakamura's report which recorded what Gadia said during two interviews on August 9th and 10th of 2007. The trial court found that since Jesus would have the opportunity to cross-examine the declarant and test the reliability of Officer Nakamura, Jesus' confrontation rights would be satisfied. On the stand, Officer Nakamura read aloud:

> I inquired from . . . Gadia if it was an accident. [G]adia informed me in a low, slurred tone of voice, that he did it on purpose. I inquired from her to whom was she referring to. [G]adia stated, 'Junior, my boyfriend.'. . . Gadia in a low tone of voice stated that it was over her coworker. [G]adia started coughing heavily and started to moan. I then ceased the interview and told her that we will come back at a later time to interview her. [G]adia informed me that she was afraid of Junior and does not want to see him, that she wanted him to go to jail in regards to what he did to her.

Tr. at 154 (Jury Trial, Nov. 19, 2007). Then Officer Nakamura continued to read to the jury what Gadia said during the second interview on August 10, 2007. On the stand, Officer Nakamura read aloud:

> [G]adia started to cry and stated that she is scared that he might come after her. I assured her that it will not happen. [G]adia continued to cry and called out her mother. [G]adia was still crying and stated they were going down, he stopped and told her to get out of the car. [G]adia, who by now was hysterical, stated that she was trying to move away from him. [G]adia stated, 'He just ran me over like it was nothing. God help me not to die.' She then stated that he tried to jack up the car and then tried to pick it up. [G]adia stated that she pleaded for help from him and even told him that if he doesn't, she will die.

Tr. at 155-56 (Jury Trial, Nov. 19, 2007). After the prosecution rested its case, Jesus made two motions for a judgment of acquittal. Jesus argued that there was not sufficient evidence to send the matter to a jury or sustain a guilty verdict. The trial court denied Jesus' motions for acquittal and found that the prosecution had presented a prima facie case against Jesus.

[14] Jesus was convicted and sentenced to one year imprisonment, one year parole, and fined one thousand dollars for the guilty verdicts of two misdemeanor assaults and a misdemeanor for family violence. Judgment was entered and Jesus filed a timely notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

[15] This court has jurisdiction over this appeal from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (West Supp. 2008); 7 GCA §§ 3107(b), 3108(a) (2005); and 8 GCA §§ 130.10, 130.15(a) (2005).

[16] Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *People v. Salas*, 2000 Guam 2 ¶ 11; *see also Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 974 n.2 (9th Cir. 2006); *United*

States v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004); *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002); *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000).

[17] Under Rule 104(a) of the Guam Rules of Evidence, preliminary determinations of fact made by a trial court are reviewed under the clearly erroneous standard. *See Bourjaily v. United States*, 483 U.S. 171, 175, 181 (1987); *Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 8 (findings of fact will be set aside only if clearly erroneous).

[18] The trial court's decision to admit evidence under a hearsay exception is reviewed for an abuse of discretion. *People of Guam v. Cepeda*, 69 F.3d 369, 371 (9th Cir. 1995); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("All evidentiary decisions are reviewed under an abuse-of-discretion standard"). "A court abuses its discretion by basing its decision on an erroneous legal standard or clearly erroneous factual findings, or if, in applying the appropriate legal standards, the [trial] court misapprehended the law with respect to the underlying issues in the litigation." *San Miguel v. Dep't of Pub. Works*, 2008 Guam 3 ¶ 18; *see also Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003); *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001).

[19] We review de novo the *legal question* that was initially posed to the trial court of whether the evidence was insufficient to support a jury finding of guilt beyond a reasonable doubt. *See People v. Maysho*, 2005 Guam 4 ¶ 6 ("If a defendant preserves the claim of sufficiency of the evidence by filing a motion for acquittal, the standard of review on appeal is *de novo*"); *see also Kaplan v. California*, 413 U.S. 115, 122 (1973) ("[T]he prosecution's evidence was sufficient, *as a matter of federal constitutional law*, to support petitioner's conviction." (emphasis added)); *Kotteakos v. United States*, 328 U.S. 750, 763-64 & n.18 (1946) ("[I]t is not the appellate court's function to determine guilt or innocence. . . . Those judgments are exclusively for the jury, given

always the necessary minimum evidence *legally* sufficient to sustain the conviction.") (emphasis added); *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004). This court "reviews the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Flores*, 2004 Guam 18 ¶ 6. This standard is highly deferential to the jury's verdict and not deferential to the trial court's decision to deny the motion for a judgment of acquittal. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Parker v. Gerrish*, 547 F.3d 1, 8 (1st Cir. 2008) (sufficiency of the evidence review "is weighted toward preservation of the jury verdict . . . ." (quoting *Rodowicz v. Mass. Mut. Life Ins. Co.*, 279 F.3d 36, 42 (1st Cir. 2002)).

III. DISCUSSION

[20] On appeal, Jesus argues that the trial court erred in admitting the excerpts from Officer Nakamura's report into evidence, arguing that the excerpts denied him of his constitutional right to confront the witness.[2] He further asserts that the statements recorded in Officer Nakamura's report fall in neither the excited utterance nor the "present sense impression" exceptions to hearsay because Gadia's statements came six and seven days after the incident.

[21] Moreover, Jesus believes the prosecution did not lay an adequate foundation to show that Gadia was unconscious nor did it lay an adequate foundation as to when Gadia allegedly became conscious.

[22] Finally, Jesus submits that the evidence introduced at trial was insufficient to support a jury verdict of guilty. We now address each of these arguments.

[2] At trial Jesus argued that the statements could not be admitted under "prior inconsistent statement" because Gadia testifying that she does not remember making a statement does not make her testimony "inconsistent." Tr. at 136 (Jury Trial, Nov. 19, 2007). Neither Jesus nor the prosecution argues this issue on appeal. The issue of whether lack of memory is an inconsistent statement for the purposes of impeachment under GRE 801(d)(1) has not been decided by this court.

A. The Confrontation Clause

[23] The Confrontation Clause of the Sixth Amendment of the United States Constitution is applicable to Guam by virtue of the Guam Organic Act.[3] 48 U.S.C.A. § 1421b(u) (West 2003). Additionally, the Organic Act of Guam independently provides that "in all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him." 48 U.S.C.A. § 1421b(g) (West 2003).

[24] Jesus argues that where a witness/declarant is found to lack memory concerning the subject matter of the declarant's statement and is thus defined as "unavailable" by GRE 804(a)(3), that witness/declarant is also "unavailable" for the purposes of the Confrontation Clause. Appellant's Br., at 9-10, 16-19 (June 4, 2008). On the premise that the witness is "unavailable," Jesus argues that the trial court violated his Confrontation Clause rights based on a *Crawford/Davis* analysis of testimonial hearsay. We disagree.[4]

[25] In *United States v. Owens*, the U.S. Supreme Court granted certiorari specifically "to resolve the conflict with other Circuits on the significance of a hearsay declarant's memory loss

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[3] In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, the court explains that in 1968, the United States Congress amended the Organic Act of Guam to extend the US constitutional rights of the first through ninth amendments to Guam. 776 F.Supp. 1422, 1426-27 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992). See also *Boumediene v. Bush*, 128 S.Ct. 2229, 2254 (2008) ("[T]he Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."); *Balzac v. Porto Rico*, 258 U.S. 298, 306-08, 312-13 (1922) (The organic act of a territory which contains a bill of rights extends those repeated portions Constitution's Bill of Rights to that territory. Moreover, only the "fundamental" rights of the Constitution apply automatically in Guam as in other unincorporated territories).

[4] Jesus erroneously relies on *Davis v. Washington*, 547 U.S. 813 (2006) and *Crawford v. Washington*, 541 U.S. 36 (2004). The facts and legal questions before this court can readily be distinguished from *Crawford* and *Davis*. In both cases, the declarants were not physically present to serve as witnesses during trial. *Crawford*, 541 U.S. at 40; *Davis*, 547 U.S. at 818-20.

Unlike the declarants in *Crawford* and *Davis*, the declarant in this present case was physically present at trial as a witness, sworn in and subject to cross-examination. *Compare Crawford*, 541 U.S. at 36, *and Davis*, 547 U.S. at 818-20, *with* Tr. at 10-127 (Jury Trial, Nov. 15, 2007). In fact, Jesus had the opportunity to cross-examine the declarant for the duration of over forty pages of the trial transcript. Tr. at 72-110, 122-127 (Jury Trial, Nov. 15, 2007).

both with respect to the Confrontation Clause and with respect to Rule 802."[5] 484 U.S. 554, 557 (1988) (citations omitted). The Supreme Court spoke directly on the issue of whether a declarant who is "unavailable" for the purposes of the Federal Rules of Evidence ("FRE") 804(a)(3), could be available to satisfy the Confrontation Clause of the Constitution. *Id.* at 563-64. As the Court observes:

> Respondent argues that this reading is impermissible because it creates an internal inconsistency in the Rules, since the forgetful witness who is deemed "subject to cross-examination" under 801(d)(1)(C) is simultaneously deemed "unavailable" under 804(a)(3). . . . It seems to us, however, that this is not a substantive inconsistency, but only a semantic oddity resulting from the fact that Rule 804(a) has for convenience of reference in Rule 804(b) chosen to describe the circumstances necessary in order to admit certain categories of hearsay testimony under the rubric "Unavailability as a witness." . . . It would seem strange, for example, to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with his trial testimony, by simply asserting lack of memory of the facts to which the prior testimony related. But that situation, like this one, presents the verbal curiosity that the witness is "subject to cross-examination" under Rule 801 while at the same time "unavailable" under Rule 804(a)(3). Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.

Owens, 484 U.S. at 563-64 (citations omitted).

[26] In response to arguments that defendant did not have the opportunity to *effectively* cross-examine the declarant/witness, the Court explains that the Confrontation Clause does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). *Owens* delineates that:

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[5] *Owen* allows the possibility that memory loss of declarant testifying at trial can be so severe that admitting such testimony could violate the Confrontation Clause. 484 U.S. at 557-58 & n.2. The case before us cannot reach this question due to the defense attorney's trial strategy in choosing not to invoke GRE 806 to cross-examine Gadia specifically on the content of the hearsay statements after they had been admitted. In mentioning Justice Harlan's concurrence, *Owen* hints that if the Court were to decide the issue, memory loss would not violate the Confrontation Clause as long as declarant willingly testify under oath and was subject to cross-examination. *Id.* at 557-58 & n.2.

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. [T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'

Id. at 558 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985)). The Court reiterates, "it is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination,) the very fact that he has a bad memory." *Id.* at 559 (citations omitted). Ordinarily, the guarantees of the Confrontation Clause are met when a witness is: placed on the stand, under oath, and responds willingly to questions. *Owens*, 484 U.S. at 561-62. Cross-examining a witness with memory loss is not fatal to the defendant's confrontation rights, but "is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement." *Id.* at 562.

[27] In this present case, Gadia (the declarant/witness) testified under oath and willingly responded to the defense's questions on cross-examination. The jury was able to observe her demeanor and draw inferences regarding her credibility. The defense asked Gadia about her past marriage to show that Gadia previously has called 911 for domestic violence and that if someone hurts her she could and would turn to the police. Gadia answered the defense's questions about what happened the night of August 3, 2007 and provided details of her conversation and interactions with Jesus leading up to the auto-pedestrian collision. Gadia described why she believed the chassis was broken on the truck and described the inside of the truck in detail.

[28] In response to the defense's question, "there [are] other people that say that you made different stories. . . . Which story should the jury believe?," Gadia responded, "it was my fault. I

got out of the car, and I went to the front. . . . Because I'm here to tell the truth. . . . He didn't ran [sic] me over twice. It was my fault. If I didn't get out of the car that night . . . it wouldn't happen." Tr. at 98-99 (Jury Trial, Nov. 15, 2007). The defense explored the extent of Gadia's memory and lack thereof. The defense asked Gadia if she loved Jesus, to which she replied, "Yeah, I love him so much. We're supposed to get married, but this car accident happened. . . ." Tr. at 103 (Jury Trial, Nov. 15, 2007). The defense asked Gadia if she would lie to protect Jesus, to which she responded at length that she would not. *Id.* at 104. Gadia was also questioned about her previous statements to police while in the hospital and she explained, "Maybe I said it because I was mad or something" and said that she thanked the defendant for saving her life. *Id.* at 104.

[29] In closing arguments, defense used the information gathered from its cross-examination of Gadia to support his case as follows:

> [Gadia] came up on the stand and she told you Mr. Jesus is innocent; she doesn't remember anything she said . . . when she was interviewed by police; she was mad, she was confused; she was under medication for her injuries. She told you that the first chance she got she went straight to the Attorney General's Office and . . . they refused to listen to her. Maybe if they did we wouldn't be here. She is not afraid to call the police. She told you she called the police seven times on her ex-husband. She never called the police once in her two-and-a-half-year relationship with Mr. Jesus. And that's the testimony you know. . . . In the end you must ask yourself: can you really trust anything she says? She is the alleged victim. Do you believe her story now or do you believe what she told Investigator Nakamura? . . . That's reasonable doubt . . . her story to Officer Nakamura or her story to you, in front of the jury. Did she really know what happened? You must ask yourself. Doesn't it seem like she just has a normal propensity to lie? Ask yourself if you can trust what she says. Is she lying then or is she lying now? That is reasonable doubt . . . .

Tr. at 47-48 (Jury Trial, Nov. 26, 2007). Clearly Jesus' confrontation rights were not violated. The defense had extensive opportunity to cross-examine Gadia and she cooperated in answering his questions. Gadia demonstrated a significant degree of memory to answer the defense's

questions in detail about the events leading up to the auto-pedestrian collision. Moreover, Gadia was able to explain the reason why she *may* have made the previous statements that she testified to not remember making.

[30] Jesus' argument that admitting Gadia's statements contained in Nakamura's report violated the Confrontation Clause because she could not remember making the statements is untenable. We next examine whether these statements were admissible under the "exited utterance" exception to the hearsay rule.

B. Excited Utterance Analysis

1. Finding that the witness was "unconscious" until August 9, 2007

[31] Before we can reach the issue of whether the excited utterance hearsay exception was correctly applied, we must address the threshold issue of foundation pursuant to GRE 104(a) which states:

> Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).[6] In making its determination it is not bound by the rules of evidence except those with respect to privileges.

GRE 104(a). Rule 104(a) covers admissibility once it has been found relevant under 104(b). Rule 104(b) is concerned with the relevancy of the evidence as defined by GRE 401 as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." GRE 401 (emphasis added). Thus, the relevancy of the Gadia's statements do not depend on the fulfillment of the requirements of an excited utterance exception under Rule

[6] GRE 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." GRE 104(b).

803(2). Rather, under 104(b), relevance of Gadia's statements would depend on whether or not she actually made the statements. The prosecution does not argue this point.[7] Therefore, the foundational issue of Gadia's unconsciousness and when she awoke is a preliminary fact question that is governed by 104(a) rather than 104(b).

[32] Generally, Rule 104(a) of the Federal Rules of Evidence (from where Guam derives GRE 104(a)), reflects the common law view that findings of preliminary fact necessary to an admissibility ruling are left to the discretion of a trial judge without close supervision.[8] *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982). In making such preliminary determinations, the trial judge can weigh credibility and "is not bound by the rules of evidence." GRE 104(a); *see also Harris v. Toys "R" Us-Penn, Inc.*, 880 A.2d 1270, 1278 (Pa. Super. Ct., 2005). In criminal cases, courts have "imposed minimum rules." *Steele*, 684 F.2d at 1202. The proponent of the preliminary question of fact bears the burden of persuasion by a preponderance and "adverse inferences may be drawn from the failure of the defense to offer credible evidence to the contrary." *Id.* at 1202; *see also Bourjaily*, 483 U.S. at 175 ("We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof."); *United States v. Water*, 413 F.3d 812, 818 (8th Cir. 2005) (prosecution seeking to admit statement bears the burden of proof).

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[7] In this instant case, the prosecution presented case-law from other state jurisdictions as persuasive support for the proposition that unconsciousness for a period of time satisfied the requirements for GRE 803(2) excited utterance exception to hearsay. Jesus argues that before the trial court could admit the statements under Rule 803(2), the prosecution must prove that Gadia was indeed unconscious and became conscious on the morning of August 9, 2007. Jesus asserts that the case-law (as well as Rule 803(2)) is not relevant if Gadia was not unconscious throughout the entire period until the morning of August 9, 2007.

[8] The Guam Rules of Evidence are essentially identical to its like-numbered counterparts in the Federal Rules of Evidence. Therefore, interpretations of the Federal Rules of Evidence from other jurisdictions are persuasive authority. *See People v. Farata*, 2007 Guam 8 ¶ 29 n.2; *People v. Diaz*, 2007 Guam 3 ¶ 14 n.4; *Shorehaven Corp. v. Taitano*, 2001 Guam 16 ¶ 10 n.5; *People of Guam v. Cepeda*, 69 F.3d 369 (9th Cir. 1995).

[33] Since Gadia's medical condition is a factual determination, this court will not reverse the trial court's preliminary factual conclusions unless they were clearly erroneous. *See Zahnen*, 2008 Guam 5 ¶ 8. Based on the preponderance of the evidence presented both during trial and in-*camera*, the trial court did not clearly err in determining that Gadia was unconscious and awoke the morning of August 9, 2007.[9]

[34] The EMT testimony that Gadia could not verbally answer at the scene of the auto-pedestrian collision; Officer Nakamura's report stating that Gadia's ventilator tube was recently removed from her mouth; Officer Nakamura's report stating that Lt. Krejci who was attending over Gadia contacted the police department when Gadia "woke up" as well as testimony regarding Gadia having underwent surgery (thus under anesthesia inducing patient unconsciousness) all together support a finding that Gadia was unconscious and awoke the morning of August 9, 2007.

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[9] The trial court never explicitly stated that it found Gadia unconscious until the morning of August 9, 2007. The trial court stated that the prosecution had to "show that [Gadia] just regained consciousness, then it would be admissible, but [the prosecution would have] to lay that foundation first." Tr. at 56 (Jury Trial, Nov. 15, 2007). The court took "notice that the medic testified that Ms. Gadia was unable to speak." Tr. at 144 (Jury Trial, Nov. 19, 2007). The trial court stated that,

> [The prosecution] made an offer of proof that there would be testimony that she did not regain consciousness until August 9th. That would provide a reasonable and excused time lapse between the actual point of the event and the statements made to Officer Nakamura. For purposes of [Rule 803], paragraphs one and two, and that is supported by case law that when the time lapse is a result of known unconsciousness, then it still can be considered as made at the time of the event or under the influence of the event.

Id. Although not explicitly stated, it is implied that the court found that Gadia was unconscious until the morning of August 9, 2007.

2. Excited Utterance

[35] Rule 803(2)[10] of the Guam Rules of Evidence provides an excited utterance hearsay exception for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." GRE 803(2). The exception stems from a belief that a statement made during a moment of excitement and without the opportunity to reflect on the consequences of one's statement has greater indicia of truth and reliability than a similar statement offered in the relative calm of the courtroom. *White v. Illinois*, 502 U.S. 346, 356 (1992), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *see also Idaho v. Wright*, 497 U.S. 805, 820 (1990), *abrogated on other grounds by Crawford*, 541 U.S. at 36; *United States v. Ledford*, 443 F.3d 702, 711 (10th Cir. 2005); *United States v. Alexander*, 331 F.3d 116, 122 (D.C. Cir. 2003); *United States v. Brown*, 254 F.3d 454, 458 (3d Cir. 2001). Accordingly, the Ninth Circuit observed that "a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is . . . spontaneous and sincere . . . ." *United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir. 2002) (quoting 6 Wigmore, Evidence § 1745 at 193). Testimony covered by a "firmly rooted" exception to the hearsay rule provides the necessary guarantee of its trustworthiness. Therefore, there is no need to independently inquire whether the statements, once found to be "excited utterances," are trustworthy. *See, e.g.*, *Wright*,

[10] Although the trial court found that the statements could be admitted under either Rule 803(1) or 803(2), only 803(2) really applies. Often, both "present sense impressions" and "excited utterances" fall under the term "spontaneous declarations" which are discussed by many courts as "*res gestae*" exceptions. The committee notes to FRE Rule 803(1) and 803(2) state that the two rules overlap based on "somewhat different theories." FED R. EVID. 803(1), 803(2) advisory committee's note. Although the two rules overlap, Rule 803(2) better encompasses the exception applied by the trial court on the argument that Gadia's medical condition "temporarily still[ed] the capacity of reflection and produces utterance free from conscious fabrication." *See id.* Moreover, the prosecution only argues Rule 803(2) in the Opposition Brief. Therefore this analysis will continue with reference to 803(2). *See e.g.*, *United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002) ("Unlike present sense impressions, '[a]n excited utterance need not be contemporaneous with the startling event to be admissible.'").

497 U.S. at 815 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

[36] For a statement to be admitted under an excited utterance exception to hearsay, most courts have interpreted FRE 803(2) to require: 1) an event or condition startling enough to cause nervous excitement; 2) the statement relates to the startling event; and 3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. *See United States v. Arnold*, 486 F.3d 177, 184 (6th Cir. 2007); *Ledford*, 443 F.3d at 710; *Alexander*, 331 F.3d at 122; *Alarcon-Simi*, 300 F.3d at 1175; *Brown*, 254 F.3d at 458; *United States v. Wesela*, 223 F.3d 656, 663 (7th Cir. 2000); *Cepeda*, 69 F.3d at 372. "All three inquiries bear on 'the ultimate question': '[W]hether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.'" *Arnold*, 486 F.3d at 184 (quoting *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir. 1983)).

[37] The first two requirements that the event or condition was startling enough to cause nervous excitement and that the statements relate to the startling event are readily satisfied in this case. It was not an abuse of discretion for the trial court to find that Gadia being run over by a truck, experiencing life-threatening physical trauma, extensive surgery and intensive medical care was startling enough to cause nervous excitement. *See, e.g.*, *Wilcox*, 487 F.3d 1163, 1171 (8th Cir. 2007); *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006) (finding that the trial court did not abuse its discretion in admitting hearsay, where declarant, having been shot five times, sounded calm during a phone call to the police as the ambulance was on its way); *Arnold*, 486 F.3d at 184-85; *United States v. Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (finding burglary "may constitute a startling event, but even if it did not, the subsequent verbal

altercation . . . where [declarant was threatened with a gun] qualifies as a startling event."); *United States v. Jones*, 299 F.3d 103, 113 (2d Cir. 2002) (finding that a man exposing himself, masturbating, and making catcalls to a teen-age girl was sufficiently startling). Gadia's statements refer to the circumstances surrounding being hit by a truck and sufficiently relate to the startling event, thus satisfying the second requirement.

[38] The third requirement that the statement must be made while the declarant is under the stress of the excitement caused by the event consumes the bulk of the contention and analysis in cases applying the excited utterance exception. *See, e.g., Ledford*, 443 F.3d at 710-11; *Alexander*, 331 F.3d at 122-24; *Alarcon-Simi*, 300 F.3d at 1175; *Brown*, 254 F.3d at 458-62; *Wesela*, 223 F.3d at 663-64. Courts look at various external factors as indicia of the declarant's state of mind at the time of the statements and no one factor is dispositive. *See e.g., Wilcox*, 487 F.3d at 1170; *Alexander*, 331 F.3d at 123; *Cepeda*, 69 F.3d at 372; *see also United States v. Joy*, 192 F.3d 761, 766-67 (7th Cir. 1999). In deciding whether the statement was the product of stress and excitement rather than reflective thought, courts have considered various factors in totality which may include but are not limited to: the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, age/maturity of the declarant, the physical and/or mental condition of the declarant, characteristics of the event, and the subject matter of the statements. *E.g., Wilcox*, 487 F.3d at 1170; *Alexander*, 331 F.3d at 123; *Cepeda*, 69 F.3d at 372; *United States v. Joy*, 192 F.3d 761, 766-67 (7th Cir. 1999).

[39] Having identified the various factors courts examine as indicia for a declarant's state of mind, we will now evaluate the factors most relevant to this case to determine whether Gadia's statements to Officer Nakamura on August 9th and 10th were made while she was under the stress of the excitement caused by the collision.

a. "the lapse of time between the startling event and the statement"

[40] The lapse of time is often a central inquiry to determine whether the declarant spoke under the stress of the excitement caused by the event, but this factor is not dispositive. *See, e.g.*, *Ledford*, 443 F.3d at 711; *Wesela*, 223 F.3d at 663. The inquiry focuses on "'the *psychological impact* of the event itself' and not upon the contemporaneity of the startling event." *Alexander*, 331 F.3d at 122 n.6 (quoting *Jones*, 299 F.3d at 112 n.3); *see id.* at 122 ("An excited utterance need not be contemporaneous with the startling event to be admissible.") (quoting *United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1998)); *Wesela*, 223 F.3d at 663. As the Advisory Committee Notes to Rule 803(2) observe, "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Fed. R. Evid. 803(2) advisory committee's note (quoting M.C. Slough, *Spontaneous Statements and State of Mind*, 46 Iowa L. Rev. 224, 243 (1961)). In sum, "there is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance." *Ledford*, 443 F.3d at 711.

[41] Based on the totality of the circumstances, statements made hours after the startling event may still fall within the excited utterance exception. In *United States v. Tocco*, the Court of Appeals for the Second Circuit held that although an adult declarant's statement was made nearly *three hours* after the startling event, it was still admissible under the excited utterance exception. 135 F.3d 116, 127-28 (2d Cir. 1998). In *United States v. Baggett*, the Sixth Circuit applied the excited utterance exception where declarant made statements *several hours* after the last of many spousal beatings over a three-day period. 251 F.3d 1087, 1090 & n.1 (6th Cir. 2001). In *United States v. Cruz*, the First Circuit found that statements made by declarant when she entered a battered women's shelter *four hours* after the traumatic event fell within the excited utterance

exception. 156 F.3d 22, 30 (1st Cir. 1998). In *United States v. Scarpa*, the Second Circuit found that the declarant was still in an excited state *five to six hours* after being beaten by members of a criminal organization. 913 F.2d 993, 1016-17 (2d Cir. 1990).

[42] As discussed below, when the totality of circumstances includes extreme trauma to an adult declarant, statements made days and weeks after the startling event may still fall within the excited utterance exception. *See e.g.*, *United States v. Napier*, 518 F.2d 316, 317-18 (9th Cir. 1975); *Apolinar v. State*, 155 S.W.3d 184, 189-90 (Tex. Crim. App. 2005).

b. "whether the statement was made in response to an inquiry"

[43] Although not determinative, a statement made in response to an inquiry could bear on whether the statement was spontaneous or deliberative. However, a victim's statement made in response to an inquiry does not, without more, negate its spontaneity as an "excited utterance." *See, e.g.*, *Clemmons*, 461 F.3d at 1061; *Alexander*, 331 F.3d at 123 n.7; *Joy*, 192 F.3d at 767; *Cepeda*, 69 F.3d at 372; *Webb v. Lane*, 922 F.2d 390, 394 (7th Cir. 1991); *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980); *State v. McHoney*, 544 S.E.2d 30, 35 n.3 (S.C. 2001).

c. "the physical and/or mental condition of the declarant"

[44] Often, a witness' description of the declarant's emotional state is sufficiently weighty in determining whether the declarant's state of mind falls with the excited utterance exception. *See, e.g.*, *Schreane*, 331 F.3d at 564-65 (testimony that declarant was "nervous," "scared," "excited," "eager to 'get away from the vehicle,'" "speaking in a 'high-pitched voice,'" "in need of being 'slowed down'" and had an "excited physical demeanor"); *Jones*, 299 F.3d at 113 (testimony that declarant was "scared," appeared to be agitated and calling to "come to the front, quick, quick, quick."). Describing the declarant's voice, appearance, demeanor, whether the declarant was

crying or appeared frighten, is often sufficient to demonstrate that the declarant was in an excited state. *See e.g.*, *Schreane*, 331 F.3d at 564-65; *Jones*, 299 F.3d at 113.

[45] In cases where a declarant has lost consciousness or the ability to speak after sustaining fatal or nearly fatal wounds, declarant's accusatory statement made upon regaining consciousness or recovering the ability to speak is often admissible under an excited utterance exception to hearsay, despite the lapse of time. *See*, *e.g.*, *Apolinar*, 155 S.W.3d at 189-90 (finding admissible declarant's statements made after a period of four days of unconsciousness, being under anesthesia and having undergone surgery as a result of being attacked); *People v. Watkins*, 230 N.W.2d 338, 339-40 (Mich. Ct. App. 1975) (finding that the declarant had lost a lot of blood, was in pain and "at times appeared unconscious and in a state of shock" was sufficient to admit statements as "excited utterances" despite fifteen to forty-five minute lapse in time). In *State v. Plummer*, the New Hampshire Supreme Court found the declarant's statements were "excited utterances" where the declarant "lapsed in and out of consciousness. . . . was in a state of intoxication throughout this period, and due to the severity of the injuries was in considerable pain." 374 A.2d 431, 434 (N.H. 1977). In *State v. McHoney*, the Supreme Court of South Carolina found that where the declarant's throat had been cut and she was unable to speak, the declarant's delayed statements were still excited utterances. 544 S.E.2d at 34-35 & n.3.

[46] *United States v. Napier* illustrates one of the most extreme examples where the physical and mental condition of the declarant was a predominant factor in finding hearsay statements admissible under the excited utterance exception. 518 F.2d at 317-18. In *Napier*, the declarant/victim suffered brain damage which left her memory intact but could only communicate in isolated words and simple phrases. *Id.* at 317. The statement was made nearly a week after returning home from the hospital after a family member showed declarant a

newspaper article with defendant's picture. *Id.* at 317-18. The declarant immediately "pointed to it and she said very clearly, 'He killed me, he killed me.'" *Id.* at 317. The Ninth Circuit found that under these circumstances, the declarant's unexpected confrontation with the photograph was a startling event sufficiently stemming from the initial attack and declarant's statement was admissible. *Id.* at 317-18.

3. The August 9th Statements

[47] Based on the totality of the circumstances, it is reasonable for the trial court to find a six-day delay between getting ran over by a truck and speaking to Officer Nakamura to fall within the excited utterance hearsay exception. The last moment that Gadia remembered from August 3, 2007 was that she was screaming and there was a truck on top of her. Gadia awoke to find herself in the intensive care unit of a hospital, with a ventilator tube in her throat; a long scar from her chest to her abdomen; and nurses frequently injecting her with sedatives and other medication.

[48] Throughout those six days, Gadia was either semi-conscious or unconscious and was unable to speak due to her physical condition, medication (pain killers and sedatives), anesthetic drugs and ventilator tube. It is clear that until the morning of August 9, 2007, Gadia's condition rendered her incapable of engaging in the type of deliberation that would render her statements inadmissible.

[49] An approximate two-hour and forty minute lapse in time between Gadia's initial statement to Lt. Krejci at around 11:55 a.m. and her subsequent statements to Officer Nakamura at around 2:40 p.m. is also within a reasonable range for the trial court to find that Gadia was still under physical and psychological shock stemming from the auto-pedestrian collision. Given Gadia's continued apprehension that her boyfriend may come to hurt her in the hospital, she

made statements to one of the first individuals in a position that could help and protect her from further harm, Officer Nakamura. Combined with the severity of physical trauma, being heavily sedated and recently having a ventilator tube removed, it is reasonable to find that Gadia was in a continued state of stress and fear when she spoke to Officer Nakamura at around 2:40 p.m. on August 9, 2007.

[50] Accordingly, the trial court did not abuse its discretion in concluding that Gadia was still under the stress of excitement when she made statements to Officer Nakamura on August 9, 2007.

4. The August 10th Statements

[51] Our analysis of the factors surrounding the August 10th statements leads us to a different conclusion. A day after Gadia became conscious and was able to speak, she was talking on the phone with a family member as Officer Nakamura walked in on August 10, 2007. Gadia was able to collect herself, think more clearly and had not been in a continued state of shock and excitement from the day prior. The prosecution asked, "Do you remember when [the officers] walked into the room, you said when you were hanging up the phone . . . 'Okay. I've got to go because the cops are here'?" Tr. at 36 (Jury Trial, Nov. 15, 2007). Gadia recognized that the "cops [were] here" and had to end her conversation in preparation for an interview. Although Gadia became emotional during the interview, the totality of the circumstances indicate that she had not been in a continued state of shock from the time of the startling event until the time of her statements to Officer Nakamura on August 10, 2007.

[52] Therefore, we conclude that the trial court abused its discretion by admitting Gadia's statements made on August 10, 2007.

C. Effect of Admitting the August 10th Statements

[53] Having found error, we must next determine whether the admission of the August 10th statements as an exception to the hearsay rule was sufficiently prejudicial to Jesus and thus require reversal. Guam has codified the harmless error doctrine in Rule 130.50(a) of the Guam Rules of Criminal Procedure and in Rule 103(a) of the Guam Rules of Evidence.[11] 8 GCA 130.50(a) (2005); GRE 103(a). Rule 130.50 of the Guam Rules of Criminal Procedure states that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." 8 GCA 130.50(a) (2005). Rule 103(a) of Guam Rules of Evidence reiterates the same harmless rule, stating that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." GRE 103(a).[12]

[54] The harmless error rule "recognizes . . . that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citations omitted); *accord Coleman v. McCormick*, 874 F.2d 1280, 1288-89 (9th Cir. 1989) (*en banc*). A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict. *People v. Moses*, 2007 Guam 5 ¶ 18. This standard requires that the prosecution show a "fair assurance" that the verdict was not substantially swayed by error. *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002); *United States*

[11] Rule 130.50(a) of the Guam Rules of Criminal Procedure is substantively the same as Rule 52(a) of the Federal Rules of Criminal Procedure (8 GCA § 130.50 uses the synonym "de minimus" rather than "harmless" in its subheading). Rule 103(a) of Guam Rules of Evidence is exactly the same as Rule 103(a) of the Federal Rules of Evidence.

[12] Rule 103(a) of Guam's Rules of Evidence serves an additional function of delineating the procedural requirements during trial in order for a party to preserve a harmless error claim on appeal.

v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (*en banc*); *United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996).

[55] We can say with "fair assurance" that admitting the additional hearsay statements from August 10, 2007 into evidence, was harmless. The statements of August 10th contain no additional information that was not already admitted into evidence and were merely cumulative. *See* 1 J. Weinstein & M. Berger, Weinstein's Federal Evidence §103.41[5][g] at 63-64 (2007). The prosecution presented abundant evidence to support a jury's finding of guilty. *See id.* at §103.41[5][h] at 64-65; *see also United States v. Jefferson*, 925 F.2d 1242, 1255 (10th Cir. 1991) ("Because there was an abundance of evidence . . . from which the jury could have reached these conclusions without depending upon the [erroneous hearsay], we find that the admission of the [erroneous hearsay] into evidence was harmless.").

[56] It was undisputed that Jesus' truck ran over Gadia and it was undisputed that Jesus was alone in the car with Gadia prior to her being run over. Jesus admitted to Officer Meyenberg that he and Gadia had a lot of relationship problems mainly resulting from him accusing Gadia of having affairs. Just prior to the auto-pedestrian collision, Jesus and Gadia were arguing about whether she was having an affair with one of her co-workers. Tr. at 14-18, 47, 53 (Jury Trial, Nov. 19, 2007).

[57] To support an inference that Jesus must have been in the truck accelerating at the time of the collision (to rebut the defense's theory that the car rolled on its own), the prosecution introduced evidence regarding the slope of the hill and the inability of the truck to create the injuries that Gadia incurred without a driver accelerating. The prosecution presented testimony from an expert on family violence to explain why victims of domestic violence may chose to

protect those who abuse them and the prosecution impeached Gadia with her prior inconsistent statements.

[58] The prosecution presented abundant evidence to support the jury's finding that Jesus was guilty and the erroneous admission of the August 10, 2007 statement did not affect the jury's verdict. The substantial rights of Jesus in obtaining a fair trial were not affected by admitting the August 10th statement into evidence.

E. The Evidence was Sufficient to Support a Jury Finding of Guilty

[59] Although Jesus states the correct law for the sufficiency of the evidence standard, he attempts to argue the evidence in a light most supportive to the defense.[13] Jesus misconstrues the standard by trying to re-argue that there is reasonable doubt. The U.S. Supreme Court has directly spoken on the matter reminding that "this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Jackson*, 443 U.S. at 318-19 (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)). Instead "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (second emphasis added); *see also Flores*, 2004 Guam 18 ¶ 6.

[60] The purpose of this standard is to "give[] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "[T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all*

[13] Jesus argues that "all the circumstantial evidence . . . points to the fact that the incident was in fact an accident." Appellant's Br. at 21.

of the evidence is to be considered in the light most favorable to the prosecution." *Id.* at 319. This highly deferential standard is in place to ensure that the sufficiency of the evidence review only invades the province of the jury "to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319.

[61] The appellate court cannot merely substitute its judgment for that of the jury. *E.g.*, *Weiler v. United States*, 323 U.S. 606, 611 (1945); *United States v. Lopez*, 477 F.3d 1110, 1114 (9th Cir. 2007); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988) ("[U]nder the Seventh Amendment, the court may not substitute its judgment of the facts for that of the jury . . . ."); *see also People v. Chargualaf*, 2001 Guam 1 ¶ 30 ("Courts should accept the collective judgment of the jury and should refrain from delving into the jurors' thought processes."). While it is possible that a different finder of fact could have reached a different conclusion, sufficient evidence exists to support the jury's finding that Jesus was guilty beyond a reasonable doubt. *Macris v. Swavely*, 2008 Guam 18 ¶ 12.

[62] In a sufficiency of the evidence analysis, courts determine whether there is sufficient direct and/or circumstantial evidence from which reasonable inferences can be drawn to support each element of the crime or crimes charged. *See Flores*, 2004 Guam 18 ¶ 6; *see also United States v. Boskic*, 545 F.3d 69, 85 (1st Cir. 2008) ("evidence sufficient to support a guilty verdict may be entirely circumstantial, and the factfinder is free to choose among reasonable interpretations of the evidence.") (quoting *United States v. Vazquez-Botet*, 532 F.3d 37, 59 (1st Cir. 2008)). Although it is possible that there is insufficient evidence for every element of a crime, generally, appellants should argue what specific element or elements were not supported by sufficient evidence. *See, e.g.*, *United States v. Mejia*, 545 F.3d 179, 202-04 (2d Cir. 2008) (appellants specifically argued that evidence was insufficient to show that the "MS-13" gang was

an "enterprise engaged in racketeering activity" and that the evidence was insufficient to prove the element of intent.); *United States v. Castaldi*, 547 F.3d 699, 705-06 (7th Cir. 2008) (appellants specifically argued insufficient evidence on intent to defraud and to the element of criminal intent).

[63] Although Jesus broadly argues that "the Government cannot point to any evidence at trial which would reasonably support a finding of guilt beyond a reasonable doubt," his arguments focus on whether the collision was an "accident" which goes to the element of intent. Appellant's Br., at 21 (June, 4, 2008). Therefore, although our analysis will explain how the other elements were supported by sufficient evidence, our focus will be on the element of intent.

[64] We have already explained in our harmless error analysis how the government presented abundant evidence to prove Jesus' guilt. The prosecution provided sufficient evidence to support every element of the crimes that Jesus was convicted of. It is undisputed that Gadia was run over by her boyfriend, Jesus' truck. It is undisputed that shortly before the collision, Jesus argued with Gadia over whether she was having an affair with a co-worker. The prosecution provided ample evidence for a jury to find intent: 1) evidence to show that Jesus was in the car and accelerated at the time of the collision; 2) testimony detailing the history of the relationship between Gadia and Jesus; 3) testimony of a fight rooted in jealousy just prior to the collision; 4) Gadia's August 9th statement that Jesus ran her over on purpose and that she was afraid of him; 5) and family violence expert testimony to rebut the defense's argument that the collision was an accident by explaining why a victim of domestic abuse would defend his or her abuser. A reasonable jury could have disbelieved Gadia's in court testimony regarding Jesus' intent.

[65] Under a standard which views the evidence in the light most favorable to the prosecution, based on the entire record presented, a reasonable jury could conclude beyond a reasonable

doubt that Jesus was guilty of two counts of misdemeanor assault and one count of misdemeanor family violence.

IV. CONCLUSION

[66] Jesus' rights under the Confrontation Clause were not violated by admitting Gadia's statements to Officer Nakamura even though she could not remember making the statements. Moreover, under Rule 104(a) of the Guam Rules of Evidence, the trial court did not clearly err in finding that Gadia was "unconscious" until the morning of August 9th nor did the trial court abuse its discretion in finding the August 9th statements admissible under Rule 803(2) of the Guam Rules of Evidence. Although the trial court abused its discretion in admitting the August 10th statements, such error was not sufficiently prejudicial to warrant reversal. The evidence presented at the trial was sufficient to support the Jury's finding of Jesus' guilt.

[67] Accordingly, we **AFFIRM** the judgment of the Superior Court.

F. PHILIP CARBULLIDO
F. PHILIP CARBULLIDO
Associate Justice

ALEXANDRO C. CASTRO
ALEXANDRO C. CASTRO
Justice *Pro Tempore*

ROBERT J. TORRES
ROBERT J. TORRES
Chief Justice